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Brf. of Kremer, Wisner, Harvey & Johnson for Petitioner

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Clerk

Filed April 23, 1900.

Supreme Court of the United States.

In the matter of the petition of the Union Steamboat Company, claimants of the Steamer "New York," for a writ of mandamus directed to the Judge of the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR PETITIONER.

C. E. KREMER,
H. C. WISNER,
F. C. HARVEY,
W. O. JOHNSON,
Proctors for Petitioners.

Geo. Hornstein & Co., Printers, Chicago.

IN THE

Supreme Court of the United States.

In the matter of the petition of the Union Steamboat Company, claimants of the Steamer "New York," for a writ of mandamus directed to the Judge of the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR PETITIONER.

On the evening of the 21st day of October, 1891, a collision occurred in the Detroit river between the steamers "Conemaugh" and "New York," resulting in the sinking of the steamer "Conemaugh." The Erie and Western Transportation Company filed its libel in the United States District Court for the Eastern District of Michigan against the New York to recover for the damages sustained by the Conemaugh and her cargo. By appeal the case was taken to the Circuit Court of Appeals.

It came on to be heard in this court upon a writ of *certiorari* on the 19th day of October, 1899, and on the 20th day of November following, the court

filed its opinion holding that both of the said steamers were at fault for the collision.

On the 22d day of January, 1900, the court issued its mandate to the Judge of the District Court of the United States for the Eastern District of Michigan, the concluding sentences of which are as follows:

"On consideration whereof, it is now ordered, adjudged and decreed by this court that the decree of the said United States Circuit Court of Appeals in the the cause be and the same is hereby reversed; the claimants of the Conemaugh and the claimant of the New York each to pay one half of all costs in this cause.

And that the said Erie and Western Transportation Company recover against the Union Steamboat Company, $276.75 for one-half of the costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the District Court of the United States for the Eastern District of Michigan, with direction to enter a decree in conformity with the opinion of this court, with interest at the same rate per annum that decrees bear in the courts of the State of Michigan.

DECEMBER 7, 1899.

You therefore are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said writ of *certiorari* notwithstanding after this mandate reached the District Court."

The damages arising out of this collision were stipulated between the parties (as appears from the stipulation attached to and made a part of the petition in this case), as follows:

"It is hereby stipulated that the losses sustained by the parties to this cause by the collision between the said propellers Conemaugh and New York, with interest to July 3, 1896, shown by the record in said cause, are as follows:

Erie and Western Transportation Company, owners of propeller Conemaugh,	$30,508 46
Erie and Western Transportation Company, trustee for underwriters on cargo, other than intervenors	19,627 67
British and Foreign Marine Insurance Company, Limited	2,421 84
The Insurance Company of North America	7,950 09
The Union Marine Insurance Company	8,553 06
The Marine Insurance Company, Limited,	916 57
Union Steamboat Company, owners propeller New York	4,341 80
Total losses	$74,319 49

On the 24th day of March, 1900, after having had submitted to it by proctors for the "New York" and proctors for the "Conemaugh" proposed decrees, the District Court entered a decree, by the terms of which the Union Steamboat Company, as the owner of the propeller "New York," was to bear of the total damages of $74,319.49 the sum of $52,788.77, or 76.5 per cent., instead of $32,817.94, or 50 per cent. thereof, as will appear from the copy of the decree attached to this petition, marked "Exhibit C."

At the hearing in the District Court it was contended

by proctors for the "New York," that notwithstanding the finding of this court that the underwriters on the cargo of the "Conemaugh" could recover all of their damages from the "New York," the owner of the "New York" should be permitted to recoup or set off one half of the cargo damages against the claim of the libelant for damages sustained by the "Conemaugh" in the collision, so that the "Conemaugh" and "New York" would each pay one-half of the total damages.

It was further contended that the rate of interest upon the said damages at the rate that decrees bear in the courts of the State of Michigan, should not be to exceed 5 per cent. per annum instead of 7 per cent. as claimed and subsequently allowed by the District Court, contrary to law and the mandate.

It was further decreed by the District Court contrary to the mandate of this court, that the owners of the New York were to pay to the libelants one-half of the costs in the Circuit Court of Appeals, when these costs had already been paid by petititioner when it was the appellant in said Circuit Court of Appeals.

BRIEF.

I.

THE DISTRICT COURT ERRED IN NOT PERMITTING THE PETITIONER TO RECOUP A MOIETY OF THE DAMAGES TO THE CARGO OF THE "CONEMAUGH" AGAINST THE LIBELANT'S CLAIM FOR DAMAGES SUSTAINED BY IT AS OWNER OF THE "CONEMAUGH."

The mandate from this court concludes:

"You therefore are hereby commanded that such "execution and further proceedings be had in the said "cause in conformity with the opinion and decree of "this court, as according to right and justice and the "laws of the United States ought to be had, the said "writ of *certiorari* notwithstanding."

First. We contend on behalf of petitioner that under the law, practice and procedure in courts of admiralty, it is well settled, that in all cases of collision, when two vessels are concerned and both are found at fault, that the damages arising out of the collision be equally divided between the owners of the respective vessels, each paying half of the sum.

Second. We also contend that whenever one of the vessels in fault is compelled to pay the whole of the damages of a third or innocent party, that any amount above a moiety of such damages that shall be paid by such vessel, can be recouped or set off against any claim for damages that the other vessel may have sustained by reason of the collision, so that each vessel (if she be of sufficient value), pay one-half of all damages arising out of the collision.

Third. We contend that the law and practice in the courts of admiralty, although not specifically set out at length in the opinion or the mandate of this court, are a part of such mandate and that the District Court was therefore bound to follow such law and procedure in construing the mandate.

Fourth. We contend that all of the parties being before the court, either as libelants, claimants, or intervenors, the District Court was competent to adjust the equities between the parties and enter such a decree as would carry out the well settled law practice and procedure in admiralty in cases of this kind.

We therefore prepared on behalf of petitioner a decree which we believe is in harmony with the mandate and opinion of this court, and also the law and practice in courts of admiralty. The decree which we prepared will be found as "Exhibit D," attached to the petition for a writ of mandamus in this case.

The right to recoup or set off, as we contend for in this case has long been the settled law in courts of admiralty in this country. One of the earliest cases found in the books is that of "*The Eleanora*," 17 Blatch., 88.

In that case, the owners of the Schooner "Transit" and the owners of her cargo each filed a libel against the steamship "Eleanora" on account of a collision, which resulted in the loss of the schooner and cargo.

The court held that both the schooner and the steamer were at fault for the collision, and on page 104, the court, Chief Justice WAITE, says:

"Both vessels being in fault, as between themselve, the damages must be apportioned. Castner

"and others, who sue the 'Eleanora' alone, for the "cargo, are entitled, under the rule in the case of "*The Atlas* (93 U. S., 302), to a decree for the full "amount of their loss; and, as the Transit, if she had "been joined, would have been liable for one half of "this loss, *a credit may be allowed the Eleanora, on "the decree in favor of the owners of the Transit, for "a sum equal to one-half of the damages of the cargo.* "Although separate libels were filed by the owners "of the vessel and the owners of the cargo, they con- "stitute, in effect, but a single suit. They have been "heard together and submitted upon the same evidence. "Having all parties before it, the court may do what "it would have done if there had been but one libel, "that is to say, divide the damages of the collision "throughout between the two colliding vessels. A "*formal claim, to the effect, on the part of the "'Eleanora,' is not necessary.* It is rare that, in any "case, a defending vessel makes a demand for a di- "vision of damages. A complete defense is generally "insisted upon in the pleadings, and the apportion- "ment is made by the court, on the facts as they "are finally developed at the hearing. It is unneces- "sary to decide what the rule in this particular would "be if the Eleanora had not been subjected in the suit "for the cargo, because here she has been, and that, "too, upon the very testimony submitted in the suit "between the two vessels. The fund belonging to "the Transit, growing out of the collision, is in court, "and no injustice is done by using it to reimburse the "Eleanora for what she has paid for the Transit, on "account of the mutual fault of the two vessels."

Leonard v. *Whitwell*, 10 Ben., 638.

This was a libel *in personam* by the owners of the schooner "J. M. Leonard" against the owners of the steamship "Arragon" to recover the value of the schooner, her cargo and freight.

The court held both the schooner and the steamer at fault for the collision, and on page 658, Judge CHOATE says:

"The owners of the schooner have an undoubted "right to sue on behalf of the owners of the cargo for "its value. It would seem that, so sueing, their "rights as bailees must be as great as if the owners of "cargo joined as libelants. No final decree "should, therefore, it seems, be made which will give "the libelants a smaller amount as bailees than the "owners of the cargo would be entitled to receive. "* * * It seems to be unnecessary to make the "owners of the cargo parties, if that could be now "done. They are virtually before the court through "the libelants."

The C. H. Foster, 1 Fed. Rep., 733.

In this case the owners of the schooner "Helen Marr" filed their libel against the "C. H. Foster" for the loss of the vessel and her cargo, both of which were totally sost.

The court held both vessels at fault, and although the owners of the "Helen Marr" had limited their liability under Section 4283, the court found that the owners of the "Foster" could recoup one-half the damages paid to the cargo against the sum which was due from the "Foster" to the "Marr," and this without additional pleading.

In *re Leonard*, following the ruling of Judge Choate

in this case in 10 Ben., 638, the court holds that even though the limited liability proceedings had been taken on behalf of the schooner, the amount to be recovered from the offending steamer could be used as a fund to indemnify the steamer for what it had to pay on account of the damage to the cargo exceeding one half.

In the case of *Atlantic Mutual Ins. Co.* v. *Alexandre*, 16 Fed. Rep., 279, citing with approval the language of Judge Choate in 10 Ben., 638, the court on page 282, says:

"Upon the ascertainment of the damages to the respective parties, it will be competent for the court, following in principle the case of *The Eleanora*, 17 Blatchf., 105, to direct that the amount recoverable by the libelants in the suit *in rem* for the loss of the vessel and freight be first applied and paid in satisfaction of their own share of the loss of the owners of the cargo, or their representatives, the insurers, who are the libelants in the present suit, and be credited upon the claim in this suit. The claims of the respective parties would indicate a possibility that one-half of the loss of the cargo, for which the owners of the bark are answerable, may exceed the amount recoverable for the loss of the bark from the steamer. Should that prove to be the case, the libelants would be entitled to a judgment in this suit against the respondents, *in personam*, for the difference; and the latter, for their own indemnity, would be entitled to a decree against the libelants in the suit *in rem* for such excess."

The C. H. Foster, 1 Fed. Rep., 733.
The Canima, 17 Fed. Rep., 271.

This was a libel filed by the owner of the canal boat

"Redfield," and also a libel by the owner of her cargo of coal against the steamboat "Canima." The court found both vessels at fault, and on page 272 says:

"Duncan, the owner of the cargo, is entitled to re-"cover his whole damages, with costs, as in the case "of *The Atlas*, 93 U. S., 302. But as the steamship, "in paying the owner of the cargo, sustains damages "to that amount, she is entitled on payment to "offset this against the loss recoverable by the "owner of the canal boat, so far as that will go; or, "what comes to the same thing, the steamboat may "charge against the sum payable to the owner of the "canal boat the one-half of the damages to the cargo, "which the latter ought by reason of his negligence "to pay for the cargo, as in the case of *The Eleanora*, "17 Blatchf., 88, 105; *The C. H. Foster*, 1 Fed. "Rep., 733; *Leonard* v. *Whitwell*, 10 Ben., 638, "658; *Atlantic Mut. Ins. Co.* v. *Alexandre*, 16 Fed. "Rep., 279."

The Hercules, 20 Fed. Rep., 305.

In this case two libels were filed against the steamer "Hercules" for the total loss of a schooner and her cargo. The court held both vessels at fault, and on page 206 of the opinion, Judge LOWELL says:

"The claimants now ask that, from the damages "which would otherwise be due the owners of the "schooner, they should be permitted to deduct or re-"coup one-half of the value of the cargo, because each "party is liable for that loss, according to *The Atlas*, "93 U. S., 302. A recoupment of this sort has been "allowed in several cases. See *The Eleanora*, *su-"pra*; *Leonard* v. *Whitwill*, 10 Ben., 638; *The C. "H. Foster*, 1 Fed. Rep., 733; *In re Leonard*, 14

"Fed. Rep., 53; *Atlantic Ins. Co.* v. *Alexandre*, 16 "Fed. Rep., 279; *The Canima*, 17 Fed. Rep., 271. "That one vessel was wholly lost, does not prevent "a contribution in case of mutual fault. *The North* "*Star*, 106 U. S., 17; S. C., 1 Sup. Ct. Rep., 41."

The Job T. Wilson, 84 Fed. Rep., 149.

This was a libel by the owner of the tug "Wilson" against the steamship "Howard," and also an intervening petition by the owners of a scow in tow of the tug Wilson at the time of the collision.

The court held that the owners of the scow as innocent parties were entitled to recover from either the tug or the steamer, both having been held to be at fault for the collision, and on page 207 Judge Morris says:

"It seems to me a similar injustice would be "worked by permitting the owners of a vessel which "is primarily liable for only one half of the "damage of an innocent sufferer to be compelled "to pay the other half charged against the other ves- "sel, and yet refusing to allow the owners of the ves- "sel which has paid the whole to obtain the excess "out of the money in their hands payable to the "owners of the other vessel, for damages arising from "the same collision. The whole object, as it seems "to me, of the practice in admiralty, which enables "the court to deal with all the questions arising from "a collision as one transaction, is to prevent such in- "equitable results." *The City of New York*, 25 Fed. Rep., 149; *The Canima*, 17 Fed., 271; *The Hercules*, 20 Fed., 205.

Jacobsen v. *Springer*, 87 Fed. Rep., 948.

This was a collision between the Steamer "Argo"

and the Norwegian Steamship "Dumois." Petitions were also filed on behalf of people who were injured, and the Circuit Court of Appeals for the Fifth Circuit divided the damages, and on page 953 JUDGE PARDEE says:

"Finding, as we do, both the Dumois and Argo in "fault, the decree of the District Court must be re- "versed, and a new decree, adjusting the damages, "entered. The crew of the Argo who lost their ef- "fects by the collision are entitled to recover only "half their damages from the Dumois, and, as the "Argo was in fault, nothing from their own ship. "*The Queen*, 40 Fed. Rep., 694; *The City of Nor- "walk*, 55 Fed., 102. Hester and Blesine being pas- "sengers on board the Argo, and not in fault, their "representatives are entitled to recover full dam- "ages from the Dumois; but the Dumois is en- "titled to recoup half the damages so paid, and de- "duct the same from the amount awarded to the "owners of the Argo. *The Hercules*, 20 Fed., 205; "*The North Star*, 106 U. S., 17, 1 Sup. Ct., 41. The "Argo being a total loss, can recover one-half her "value from the Dumois, less one-half the damages "suffered by the Dumois, shown by the record to be "$185. Decreed accordingly."

The "Chatahoochee," 173 U. S., 540.
The "Niagara," 77 Fed. Rep., 329.

It seems to us, therefore, that the District Court erred in not permitting the owners of the "New York," the petitioner, to set off the amount that it had paid to the intervenors against any sum that was to be paid to the libelant both in the capacity of owner

of the "Conemaugh," and as trustee for the cargo that was not represented by the intervenors.

The District Court strictly construed the opinion of this court and also its quotation from the case of the "*Juniata*," 93 U. S., 337, and therefore practically held that the owner of the "New York" was compelled to resort to some separate proceeding at law or in admiralty to recover the amount that it had to pay more than its moiety of the damages in this case, and that it could not be done in this case.

It considered the opinion in the "*Juniata*" case as a part of the opinion in this case, and that this court by citing the case of the "*Juniata*" reiterated what was said in that case in reference to some future or other proceeding that might be required to collect the amount which the "New York" was compelled to pay more than its share of these damages.

We believe that the principle of law is well settled that there can be no contribution among *tort feasors*, and that this would debar the owners of the "New York" from recovering from the owners of the "Conemaugh" any part of the amount that they paid in this case, should it be compelled to resort to some other or separate proceeding. This would be a great hardship and we believe under the authorities entirely unnecessary.

The libelant in this case stands here as the owner of the "Conemaugh," with a claim of $30,508.46 for damages sustained by this vessel. As trustee for the owners of the "Conemaugh's" cargo, the libelant has a further claim of $19,627.67. The intervenors, the underwriters, are here with a further claim for

damages to the "Conemaugh's" cargo aggregating $19,841.56.

This last claim is the one this court referred to as the one which could be collected in its entirety of the "New York."

The District Court, however, not alone decreed that the New York pay this in full, but also the claim made by the libelant as trustee for owners of the cargo, for which no one has intervened.

In addition to paying these amounts in full, the District Court decreed the payment of one-half of the damages to the "Conemaugh" herself, less one-half of the "New York's" damages.

We asked that after paying the underwriters (intervenors) in full that we be allowed to recoup or set off against the claims of the libelant (as owner of the the "Conemaugh" and as trustee) one-half of the intervenor's damages, or $9,920.78, so that after paying the intervenors in full, $19,841.56, the "New York" would have to pay libelants (after deducting one-half of the "New York's" damages) the further sum of $12,976.38. This would bring out each of the vessels as paying $32,817.94, one-half of the total damages, and carry into effect the judgment of this court.

II.

WHAT RATE OF INTEREST SHOULD HAVE BEEN ALLOWED ON DAMAGES SUSTAINED BY THE PARTIES IN THIS CASE?

The mandate of the Supreme Court directs the District Court "to enter a decree in conformity with the "opinion of this court, with interest from July 3, "1896, until paid, at the same rate per annum that "decrees bear in the courts of the State of Michigan."

Section 3 of Chapter 6 of the Revised Statutes of Michigan of 1838, is as follows:

"The interest of money shall continue to be at the "rate of seven dollars and no more, upon one hundred "dollars for a year, and at the same rate for a greater "or less sum, and for a longer or shorter time. Pro- "vided, That in cases of money loaned it shall be law- "ful for the parties to stipulate in writing for the "payment of any interest not exceeding ten per cent. "per annum."

Section 8 of the same Chapter provides for interest on judgments, verdicts, etc., as follows:

"Interest may be allowed and received, upon all "judgments at law for the recovery of any sums of "money, and upon all decrees in chancery, for the "payment of any sums of money, whatever may be "the form or cause of action or suit in which such "judgment or decree shall be rendered or made, and "such interest may be collected on execution."

Section 8 was amended in 1855 (Session Laws 1855, p. 131) by adding the following: "at the rate of seven "per cent. per annum. Provided, that on a judg- "ment rendered on any written instrument having a

"different rate, the interest shall be computed at the "rate specified in such instrument, not exceeding ten "per centum."

The same provision is found in the Compiled Laws of 1857, Section 1317, Compiled Laws of 1871, Section 1635, Howell's Statutes, Section 1597, and Compiled Laws of 1897, Section 4865.

Section 3 was not amended until 1887, when the rate of interest was fixed at six per cent. per annum. S. L., 1887, p. 153.

In 1891 the Legislature passed an act entitled, "An "Act to regulate the interest of money on account, "interest on money, judgments, verdicts, etc.," as follows:

Section 1. The people of the State of Michigan enact, that the interest of money shall be at the rate of six dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases, it shall be lawful for the parties to stipulate in writing, for the payment of any rate of interest not exceeding eight per cent. per annum; provided, that this act shall not apply to existing contracts whether the same be either due, not due, or part due."

Section 4. "All acts or parts of acts contravening the provisions of this act are hereby repealed."

Act 156 of Session Laws of 1891, pages 197-8. (Compiled Laws, 1897, section 4,856.)

The Legislature of 1899 amended section 1 of the act of 1891, by fixing the legal rate of interest at five per cent. and permitting parties to contract for a rate not exceeding seven per cent.

Public Acts of 1899, Act 207, page 324.

The act went into effect October 3, 1899, and the language is as follows:

"The People of the State of Michigan enact:

"SECTION 1. That section one of act number one "hundred fifty-six of the public acts of eighteen hun- "dred ninety-one entitled 'An Act to Regulate the In "terest of Money on Account, Interest on Money, "Judgments, Verdicts, etc.,' the same being com "pilers section one thousand five hundred ninety-four "of volume three of Howell's Annotated Statutes, and "Section four thousand eight hundred ninety-seven, be "and the same is hereby amended to read as follows:

"SECTION 1. The People of the State of Michigan "enact: That the interest of money shall be at the rate "of five dollars upon one hundred dollars for a year, "and at the same rate for a greater or less sum, and "for a longer or shorter time, except that in all cases "it shall be lawful for the parties to stipulate in writing "for the payment of any rate of interest not exceeding "seven per cent. per annum; provided that this act "shall not apply to existing contracts whether the same "be either due, not due or part due."

Approved May 25, 1899.

It will be observed that in the first act authorizing interest on judgments, verdicts, etc., the rate of interest was not stated. In 1855 the Legislature fixed the rate at 7 per cent., the then legal rate of interest. It was evidently never intended that judgments, verdicts or decrees should bear a higher rate of interest than the legal rate, except in cases where the instrument upon which suit was brought bore a higher rate.

While Section 8 is found in both Howell's Statutes and the Compiled Laws of 1897, providing for 7 per

cent. interest on judgments, verdicts, etc., it is clear that Section 4 of the act of 1891 repealing all acts or parts of acts contravening the provisions of Section 1 fixing the legal rate of interest at 6 per cent., repealed that part of Section 8 which conflicted with the provisions of Section 1.

The Act of 1899, which was in force at the time of the filing of the mandate of the Supreme Court in this cause, fixes the rate of interest at 5 per cent.

The absurdity of the proposition that it was the intention of the law makers that judgments, verdicts and decrees should bear a higher rate of interest than the legal rate is shown by the following: Assume that the legal rate of interest is 5 per cent., a note without the interest rate specified would bear interest at the rate of 5 per cent. up to the time of judgment, and thereafter, if Section 8 is still in force, at the rate of 7 per cent., whereas if the note specified the legal rate, after judgment the interest would be at the same rate, on account of the provision that if judgment is rendered on any written instrument having a different rate, the interest shall be computed at the rate specified in such instrument.

It is submitted that the section fixing the rate of interest on judgments, verdicts, etc., was amended by the acts of 1891 and 1899, and that judgments, verdicts, etc, now bear the legal rate of interest, viz., five per cent.

III.

INTEREST IN ADMIRALTY CASES.

The leading case upon the question of the rate of interest in admiralty cases in this court is *Hemmenway v. Fisher*, 20 How., 1. In a number of cases the rate of interest has been fixed by the District and Circuit courts at 6 per cent. *The Aleppo*, 7 Ben., 120, Blatchford, J.; *Dyer v. Nat. St. Nav. Co.*, 14 Blatch., 483; *Mary Ecaline*, 14 Blatch., 497. In this last case Mr. Justice Hunt reduced the rate of interest from 7 to 6 per cent.

The rate of interest in the admiralty courts of Michigan has never exceeded 6 per cent., in fact, that is so in both the Sixth and Seventh Circuits.

IV.

AS TO THE COSTS IN THE CIRCUIT COURT OF APPEALS.

The District erred in decreeing that petitioners as the owners of the "New York" pay one half of the costs in the Circuit Court of Appeals.

When the case was removed by appeal from the District Court to the Circuit Court of Appeals, the petitioner was the appellant and *paid all the costs*, as appears from the mandate of that court made a part of the petition in this case as "Exhibit E."

Under the decree entered petitioner is not given credit for what it paid over the one-half of the costs but is compelled to bear all the costs, and pay a further one-half to the libelants. The decree drawn by petitioner gives it credit for these costs, so that the

libelant pays one-half of all the costs, all of which is in accordance with the plain intent of the mandate in this case.

In conclusion we desire to say that the propositions contended for by petitioner are as we believe so plain that it seems unnecessary to discuss them at greater length. It seems to us that the court could issue its writ, or indicate by its opinion in granting leave to file the petition such instructions as cannot be misunderstood by the District Court and in that way dispense with a hearing upon an order to show cause.

The court when the petition is filed is called upon to do over again the work of issuing its mandate because, as we believe, the District Court misunderstood its meaning and intent of the one now issued.

Respectfully submitted,

C. E. Kremer,
H. C. Wisner,
F. C. Harvey,
W. O. Johnson,
Proctors for Petitioners.

Chicago, April, 1900.